

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

# THE HANOVER INSURANCE COMPANY,

Plaintiff,

V.

HURDELBRINK LAW OFFICE, INC., *et al.*

### Defendants.

NO. C18-0651RSL

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

This matter comes before the Court on “The Hanover Insurance Company’s Motion for Summary Judgment.” Dkt. # 22. Plaintiff seeks a summary determination that it has no duty to defend or indemnify defendants Hurdelbrink Law Office, Inc., or Mark E. Hurdelbrink against a claim of malpractice made against them by an ex-client, defendant Christopher Wilcox. The Hurdelbrink defendants oppose the motion. Mr. Wilcox has not responded.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that

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1 show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving  
2 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to  
3 designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.  
4 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .  
5 and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723  
6 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues  
7 regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence  
8 of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to  
9 avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014);  
10 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution  
11 would not affect the outcome of the suit are irrelevant to the consideration of a motion for  
12 summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other  
13 words, summary judgment should be granted where the nonmoving party fails to offer evidence  
14 from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle  
15 Network, 626 F.3d 509, 514 (9th Cir. 2010).

16 Having reviewed the memoranda, declarations, and exhibits submitted by the parties and  
17 taking the evidence in the light most favorable to defendants, the Court finds as follows:

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22 In 2016, Mark E. Hurdelbrink represented Christopher Wilcox in divorce proceedings.  
23 Toward the end of the year, Lisa Wilcox propounded discovery, including requests for  
24 admissions. Although Mr. Hurdelbrink forwarded the requests to his client, he got no response:  
25 Mr. Wilcox was apparently on vacation. No responses were served within the time allowed. Ms.  
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1 Wilcox filed a motion seeking a declaration that three valuable assets were community property  
2 based in part on the fact that the failure to timely respond to the requests for admission meant  
3 they were deemed admitted. Mr. Hurdelbrink filed a motion for leave to file late discovery  
4 responses, agreed to extend the case management deadlines, and opposed the motion for  
5 summary judgment as to one of the assets at issue. The court nevertheless granted Ms. Wilcox'  
6 motion, finding that (a) Mr. Hurdelbrink failed to convene a discovery conference before  
7 seeking permission to file late discovery responses, (b) Mr. Hurdelbrink's two-page response to  
8 the summary judgment motion and his client's supporting declaration failed to overcome the  
9 presumption of community property raised in Ms. Wilcox' motion, and (c) an award of fees was  
10 appropriate. The presiding judicial officer did not put all of the blame for the discovery failures  
11 on Mr. Hurdelbrink: she took the opportunity of oral argument to lecture Mr. Wilcox regarding  
12 the need to take discovery obligations and deadlines seriously. Dkt. # 1-6 at 19-20.

15 Mr. Hurdelbrink apparently filed a motion for reconsideration, but his representation of  
16 Mr. Wilcox was terminated before the court ruled on that motion or on opposing counsel's fee  
17 petition. Mr. Hurdelbrink did not review subsequent filings in the case and was therefore  
18 unaware that Mr. Wilcox blamed him for the adverse community property ruling until he  
19 received a notice of claim in August 2017.

21 In April 2017, the Hurdelbrink defendants' submitted a renewal application for their  
22 professional liability insurance coverage. The policy covered "Loss which the Insured is legally  
23 obligated to pay due to a Claim first made against the Insured during the Policy Period . . .  
24 provided that: . . . [t]he Insured had no knowledge of the Claim or facts which could have  
25 reasonably caused such Insured to foresee the Claim, prior to the effective date of this Policy . . .

1 .” Dkt. # 22 at 7. Although defendants’ position is not entirely clear, there seems to be a dispute  
2 regarding whether a subjective or objective standard applies when determining whether an  
3 insured had disqualifying knowledge prior to the policy period.  
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5 We apply Washington law. Construction of an insurance policy is a question of  
6 law for the courts, the policy is construed as a whole, and the policy ““should be  
7 given a fair, reasonable, and sensible construction as would be given to the  
8 contract by the average person purchasing insurance.”” Grange Ins. Co. v.  
Brosseau, 113 Wn.2d 91, 95 (1989) (quoting Sears v. Grange Ins. Ass’n, 111  
9 Wn.2d 636, 638 (1988)). Undefined terms should be given their plain, ordinary,  
10 and popular meaning. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 881  
11 (1990). The language in standard form policies is interpreted in accord with the  
12 understanding of the average purchaser even if the insured is a large corporation  
13 with company counsel. Boeing, at 882-83.  
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15 Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 65-66 (1994). The  
16 policy provision at issue in this case is part of the definition of a covered loss<sup>1</sup> and requires that  
17 “[t]he Insured had no knowledge of the Claim or facts which could have reasonably caused such  
18 Insured to foresee the Claim” when the policy period began. Dkt. # 22 at 7. Defendants do not  
19 identify any particular ambiguity in this provision. When interpreting similar policy language,  
20 such as an exclusion for “injury which may reasonably be expected to result,” the state Supreme  
21 Court found that even though the provision did not indicate whose reasonable expectations were  
22 at issue, “the use of ‘reasonably’ implies a removed observer, looking at the facts from a neutral,  
23 ‘reasonable’ perspective.” Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 430 (1997). See also  
24 Carolina Cas. Ins. Co. v. Ott, C09-5540RJB, 2010 WL 1849230, at \*10 (W.D. Wash. May 7,  
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26 <sup>1</sup> Because the limitation helps define the scope of coverage in the first instance, defendants’  
27 reliance on case law interpreting exclusionary clauses is misplaced.  
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1 2010) (noting that prior knowledge limitations “use the phrase ‘reasonably foresee’ in order to  
2 mandate an objective, reasonable attorney standard”). Given the fair, reasonable, and sensible  
3 construction adopted by previous courts, the insuring provision in the Hanover policy means that  
4 a claim is not covered if (a) the insured was subjectively aware of the claim or (b) the insured  
5 was subjectively aware of facts which could objectively cause the insured to foresee a claim. At  
6 one point in their memorandum, defendants adopt this interpretation, stating “Put another way,  
7 the first inquiry should be . . . did Hurdelbrink have knowledge of a relevant act, error or  
8 omission when he reviewed his policy? That is a subjective determination. The next question is  
9 whether a reasonable professional in Hurdelbrink’s position might have expected a claim or suit  
10 to result from his actions on behalf of Wilcox . . . ”. Dkt. # 25 at 12. At other points, they argue  
11 that there is a genuine issue of fact regarding whether “Hurdelbrink was put on notice of any  
12 potential claim on the part of Wilcox against him” (Dkt. # 25 at 10). Subjective notice of the  
13 claim undoubtedly precludes coverage, but so does subjective knowledge of facts that made a  
14 claim reasonably foreseeable.  
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16 There is no genuine issue regarding the facts Mr. Hurdelbrink subjectively knew at the  
17 time he signed the renewal application. He knew that he had missed discovery deadlines, failed  
18 to comply with procedural rules, failed to adequately respond to a dispositive motion, obtained  
19 “an extremely unfavorable ruling” for his client as a direct result of these failures (Dkt. # 25 at  
20 3), and was terminated shortly thereafter. The Court finds that, applying an objective standard to  
21 the foreseeability issue, any reasonable attorney looking at these known facts would foresee a  
22 malpractice claim, even if he or she had hopes that no such claim would actually be made.  
23 Foreseeability does not require certainty: the fact that the client had not expressly threatened to  
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1 sue does not mean that a malpractice claim was not foreseeable. Tewell, Thorpe & Findlay, Inc.,  
2 P.S. v. Continental Cas. Co., 64 Wn. App. 571, (1992) (“Further, the language of the  
3 exclusionary clause does not require the prediction of claims with absolute certainty or  
4 exactitude. Rather the focus of the clause is on the underlying ‘acts and omissions’ that are the  
5 subject of a dispute which might give rise to a claim.”). The facts known to Mr. Hurdelbrink  
6 should have reasonably caused him to foresee the claim. Because the Hanover policy  
7 unambiguously does not cover a malpractice claim if, prior to the effective date of the policy, the  
8 insured knew “facts which could have reasonably cause such Insured to foresee the claim,” there  
9 is no coverage for Mr. Wilcox’ claim as a matter of law.<sup>2</sup>

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12 For all of the foregoing reasons, plaintiff’s motion for summary judgment is GRANTED.

13 The Clerk of Court is directed to enter judgment in favor of plaintiff and against defendants.

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16 Dated this 18th day of April, 2019.

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18 Robert S. Lasnik

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20 Robert S. Lasnik  
United States District Judge

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25 <sup>2</sup> In light of the Court’s ruling on plaintiff’s coverage provision argument, it need not determine  
the effect of Mr. Hurdelbrink’s response to an inquiry in the renewal application regarding prior  
knowledge where the “representation applies only to those coverage types for which no coverage is  
currently maintained and any higher limits of liability requested.” Dkt. # 1-12 at 7.